



FMCS

FEDERAL MEDIATION & CONCILIATION SERVICE

EEO Alternative Dispute Resolution Procedures May 2019

1. **INTRODUCTION.** This Statement of Policy addresses the use of Alternative Dispute Resolution (ADR) by the Federal Mediation and Conciliation Service (FMCS), as required by the Administrative Dispute Resolution Act (ADRA), 5 U.S.C § 571 et seq. The ADRA authorizes and encourages agencies to use mediation and other consensual methods of dispute resolution as alternatives to traditional dispute resolution processes. The ADRA requires agencies to designate a Dispute Resolution Specialist, establish a policy addressing the use of ADR, review contracts and grants for appropriate inclusion of ADR clauses and provide for regular training on ADR.

2. **POLICY.** FMCS is committed to the use of ADR, and other collaborative processes, as a management tool to prevent or minimize disputes, or to resolve disputes at the earliest stage possible in an expeditious, cost effective and mutually acceptable manner. In furtherance of this commitment to the use of ADR, and in compliance with the ADRA, FMCS's ADR Program seeks to encourage and coordinate the ADR efforts of FMCS, formulate agency-wide ADR policies, and disseminate information about internal ADR activities, including providing assistance, consultation and training within FMCS on ADR subject matter. In state and federal court litigation, ADR procedures may be mandated by applicable statutes, court orders, rules and procedures. The FMCS supports the voluntary use of ADR, including collaborative discussion and other collaborative processes, e.g., mediation, conflict coaching, partnering, facilitated dialogues and the use of an ombudsman, where appropriate.

3. **KEY TERMS**
 - a. **Workplace Conflict:** Varying opinions, values or working styles that leads to a disagreement. It is also described as a state of discord caused by the actual or perceived opposition of needs, values and interests between people working together.

 - b. **Early Intervention:** Employees and managers are strongly encouraged to use the ADR process to resolve complaints at the earliest possible opportunity to eliminate the need for lengthy investigations and/or costly litigation. Resolution of workplace disputes should be attempted at the lowest possible level within each organization. Employees are encouraged to attempt to resolve their concerns directly with the individual or individuals involved before proceeding to the next level.

 - c. **Neutrality:** The Agency ADR program will rely on a neutral third-party (one who functions specifically to aid the parties in resolving the dispute) to facilitate resolution of the dispute. ADR proceedings are most successful where a neutral or impartial third-party, with no stake in the outcome of a dispute, allows the parties themselves to attempt to resolve their dispute. Neutrality helps to maintain the integrity and effectiveness of the

ADR program. The facilitator's duty to the parties is to be neutral, honest, and to act in good faith.

- d. Collaborative discussion: Two or more parties who may have conflicting ideas or paths sit down, flesh out areas of difference and collaborate on a consensual path forward for the good of the relationship. This process is assisted by a neutral facilitator.
 - e. Mediation: refers to a non-adjudicative, third-party intervention wherein an impartial neutral, selected by the parties, facilitates negotiations between the parties to help them reach a mutually acceptable agreement. The parties are responsible for negotiating a settlement. The neutral's role is to assist the process in ways acceptable to the disputants.
 - f. Confidentiality: Confidentiality is essential to the success of all ADR proceedings. All ADR processes will assure confidentiality consistent with the provisions in the Alternative Dispute Resolution Act. This will enable parties to ADR proceedings to be forthcoming and candid, without fear that their statements may later be used against them. Neutrals will not discuss confidential communications, comment on the merits of the case outside the ADR process, or make recommendations about the case. Neutrals will not reveal to Agency staff or management confidential communications disclosed during the mediation process.
 - g. Facilitated Dialogue: Facilitate dialogue is a structured conversation between two or more parties involved in a conflict ("Disputants"). Through Facilitated Dialogue, disputants can share their thoughts, feelings, and experiences with one another in a confidential space.
 - h. Conflict Coaching: Conflict coaching is defined as a set of skills and strategies used to support peoples' ability to engage in, manage, or productively resolve conflict. In this process, the conflict coach works one-on-one with a coachee experiencing conflict with another person.
4. **PROCEDURES**. Employees are encouraged to discuss matters of concern informally with their supervisors. However, if a problem cannot be resolved, the ADR process is available. Usually, the entire ADR process should take no more than 90 days from initial contact to completion.

Step 1: Initial Intake

- a. An employee must contact the EEO Office to request ADR/conflict resolution services.

- b. The employee will be advised that in order to begin the process, he/she must complete and submit the Request for ADR Services Form (e-mails and faxes are acceptable).
- c. Upon receipt of the written request for ADR services, the EEO Director will contact the employee within five (5) calendar days.
- d. During the initial intake, a concerted effort should be focused on identifying the issues involved in a complaint, including dates of occurrence, person(s) responsible, alleged harm, and remedies requested.
- e. The EEO Director will assess the information provided, make appropriate contacts for additional information, and determine if the dispute/issue is appropriate for mediation.
 - o There may be a determination that the matter is better served by using an ombudsman outside of the agency.
- f. If there are allegations of discrimination or issues that may have EEO implications, the EEO Director will refer the individual to an internal EEO counselor for case processing. The EEO Director or the EEO Counselor will notify the individual of his/her EEO rights and options under 29 C.F.R. Part 1614. The initial contact with the EEO office within 45 days of the occurrence or personnel action being complained of will satisfy the filing time for EEO Counselor contact. The EEO Director will advise the employee in writing of the specific issues that will be accepted for ADR mediation. A copy of this letter will be retained in the EEO office files.
- g. If the EEO Director determines there are no EEO implications, but the matter is or a workplace nature, they can refer it to the agency Ombuds.
- h. Either the EEO Director or the agency Ombuds can determine whether the matter is suitable for mediation.
- i. If the dispute/issue is appropriate for mediation, notification will be provided to the employee by either the EEO Director or Ombuds. The mediation session generally will be scheduled within 21 calendar days of the request. All parties will be notified in writing of those attending the ADR session. Mediations will be scheduled during normal work hours.
- j. Parties in mediation are entitled to have representation. The employee/management will be responsible for submitting a Designation of Representative Form (if either elects to have representation) to the Agency Ombuds within seven (7) calendar days before the scheduled mediation session.

- k. If the dispute is inappropriate for ADR mediation, the employee will be notified in writing of the reason. A copy of the employee notification that the case was inappropriate for ADR will be maintained in the EEO Office. The EEO Office will then notify the individual of the right to file a formal complaint.

Step 2: Mediation

- a. The parties will meet with an impartial, neutral third-party who will facilitate the discussion and the resolution of the dispute.
- b. The agency Ombuds may serve as a mediator. Or, mediators can be selected first from the Office of Conflict Management and Prevention, followed by field mediators, or, if there is a perception FMCS mediators pose a conflict of interest, mediators may be chosen from the shared neutrals roster.
- c. The mediation begins a joint session attended by the mediator, employee, appropriate responding management official, and the designated representatives.
- d. During the joint session, the parties are advised of the mediation process, confidentiality of the process, and the role of the mediator. The mediator will answer any questions either party may have.
- e. All parties to mediation must sign an “FMCS Agreement to Mediate” outlining the terms under which the parties are agreeing to participate in the mediation.

The agreement includes the following:

- The parties agree to discuss the issues and attempt to reach an amicable resolution. The parties understand that settlement during mediation is voluntary.
- The parties understand that the mediator has no power to decide the terms of the resolution or who is right or wrong. Rather, the mediator will attempt to assist the participants in reaching their own resolution by facilitating the discussion.
- The parties understand that the mediator will not act as an advocate or attorney for either party and will not provide legal advice and/or counsel.
- The parties agree to negotiate in good faith.
- The parties agree not to subpoena the mediator or any observer to testify in any forum as to the issues discussed by the parties in the mediation.

- The mediator and all observers agree not to testify voluntarily on behalf of either party and will not report anything said during this mediation unless one of the participants makes a genuine threat of physical harm or reveals information related to criminal activity, fraud, waste, or abuse of government property, sexual harassment, or child or elder abuse.
- The parties understand that any document or notes prepared for or during mediation (such as case summaries presented to the mediator or notes taken by the mediator and the parties) are for settlement purposes only and will be given to the mediator at the conclusion of the mediation session for destruction.
- The parties understand that the mediation session will not be recorded by anyone (either video or audio) and no transcript of the session will be produced.
- The parties understand that no participant will be bound by anything said or done in mediation unless and until there is a signed written settlement agreement.
- The parties agree to discuss and define the matter to be mediated.
- Each of the parties will have an opportunity to explain his/her position on the dispute or matters of concern. The mediator encourages both parties to talk openly and candidly, voice all of their concerns, and to listen to the other party's concerns in order to reach the best possible resolution. Additionally, the mediator might meet with each party separately to discuss the problem in caucus to help each party find a solution.

Step 3: Mediation Outcomes

- a. The employee may opt to **withdraw the ADR matter** if it is (1) resolved before mediation or (2) because after consideration he/she elects not to proceed further. Under these circumstances, the file will be closed.
 - If **no settlement** agreement is reached, the EEO Director will provide written notification to the employee of his/her right to continue through the established complaint, grievance, and/or appeal systems, provided established time frames in the respective system, have otherwise been met.
 - If a settlement **agreement is reached**, terms of the agreement will be given to the agency's Special Assistant to the Director and Office of General Counsel compliance and legal sufficiency review.

- Upon OGC's certification of legal sufficiency, the Special Assistant to the Director will facilitate implementation of the settlement agreement with other functional areas within FMCS.
- The Special Assistant to the Director may confer with the EEO Director regarding settlement of cases involving EEO matters prior to the finalization of agreements to ensure that the appropriate language is included in the agreement.
- Written agreements reached will be signed during the mediation; however, settlement agreements under the ADR mediation may not violate any laws or be inconsistent or in conflict with the terms of any collective bargaining agreement.
- In the event of a **breach of the settlement agreement**, the parties may elect to (1) re-negotiate the matter, (2) apply sanctions (i.e., implementation of the original agreement by higher-level authority), or (3) a return to the status quo. For breaches of agreements involving EEO matters, the procedures set forth in the settlement agreement and in EEOC regulations will prevail.

Step 4: Evaluation

- a. An evaluation component is essential to any ADR program in order to determine whether the program has achieved its goals, how the program might be improved to be more efficient, and to achieve better results. At a minimum, evaluations should capture and analyze ADR usage, amount of time saved, cost avoidance, customer satisfaction, improved relationships, and other indicators in line with the Agency's strategic goals and objectives.
 - At the conclusion of each mediation session, all participants will be required to evaluate their experience with the mediation process and the mediator. This information will be used to assist the Agency in effectively evaluating the program. The Agency will monitor and maintain a record of ADR activity for annual reporting to the Equal Employment Opportunity Commission.



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Appendix 1: ADR / EEO Counseling Initial Intake Sheet May 2019

The Office of Equal Employment Opportunity will use this form for initial intake. Questions about this Intake Sheet should be directed to the Director of EEO at (202)606-5448. Thank you for your cooperation.

Please sign and date this form, then submit the Initial Intake Sheet to the EEO office no later than three (3) days from the date of contact.

Initial Contact Date: _____ Type of Contact: Phone Walk-in E-mail

Have you contacted any other office? _____ YES _____ NO (If yes, please check all that apply)

(1) Ombudsman Office _____ (2) Human Resources Office _____ (3) Union Representative _____

Please give Status with other office: _____

EMPLOYEE/APPLICANT NAME (MR./MRS./MS.)

Last	First	Middle
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Home Address: _____ City/State: _____ Zip Code: _____

Is Aggrieved Person/Complainant Requesting: EEO Counseling Information (Contact Only) ADR

Is Aggrieved Person/Complainant a(n): Employee Applicant Contractor Other (*Specify*) _____

Position/Series/Grade Level: _____

Contact Numbers

Work No.: _____ Home No.: _____ Cell No.: _____

E-mail Address: _____

Date of alleged incident: _____

COMPLAINT (Brief Description):

BASIS (ES) FOR DISCRIMINATION

RACE: _____ COLOR: _____ SEX: _____ RELIGION: _____

AGE (D.O.B.): ___/___/___ NATIONAL ORIGIN: _____ DISABILITY: _____

REPRISAL: _____ GENETIC INFORMATION: _____

Signature of Complainant (*if walk-in*)

Date

Received by

Date



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Appendix 2: EEO / ADR Agreement to Mediate May 2019

1. **Introduction.** This is an agreement between and the Federal Mediation and Conciliation Service. The participants agree to enter into mediation in good faith and with a sincere desire and in an effort to reach a mutually acceptable resolution of their differences regarding an EEO complaint.
2. **Time Limits.** The undersigned participants agree to set aside full days for mediation sessions as scheduled by the respective selected mediator.
3. **Logistics.** The mediation sessions start and end time, the place of the actual meeting as well as the dates to meet will be set by the respective mediator. A strict commitment on the part of all participants to comply with the schedule is expected.
4. **Provisions.** The provisions of this agreement are as follows:
 - a. The mediator will be expected to guide the participants through mediation in an effort to help them reach their own settlement. The mediator will not make decisions about "right" or "wrong" or tell the participants what to do.
 - b. The mediator is prohibited from offering legal advice nor does he or she provide legal counsel. Should any of the participants have legal counsel, each is advised to consult with appropriate attorneys for legal advice and about his/her right to legal representation.
 - c. For mediation to work, the participants agree and understand that open and honest communications are essential. Accordingly, all written and oral communications, negotiations and statements made in the course of mediation will be treated as privileged discussions and are absolutely confidential.
 - d. The mediator will not reveal to anyone the names of the participants or anything discussed in mediation unless expressly requested to do so by the participants. It is understood that the mediators are not required to maintain confidentiality if they have reason to believe that any party is in danger of bodily or egregious psychological harm, or if criminal activity is divulged.
 - e. The participants agree that they will not at any time before, during, or after mediation, call the mediators as witnesses in any legal or administrative proceeding concerning this dispute.

Initials

- f. The mediator will destroy any records, notes, work product or the like developed during the mediation process (with exception of the written settlement/ resolution agreement, should one be reached).

- g. Both the agreement to mediate and any written agreement made and signed by the participants as a result of mediation may be used in any relevant proceeding and are subject to technical review by appropriate officials before confirmation and implementation.

- h. It is understood that full disclosure of all relevant information is essential to the mediation process. Accordingly, there will be a complete and honest disclosure of relevant information and documents by each of the participants to the other and to the mediator.

- i. All participants must be in agreement regarding who will be present during the joint mediation sessions. This will include not only the participants themselves, but any representative(s) either participant proposes to be part of the mediation sessions.

In this mediation, the participants are:

- 1) _____
- 2) _____
- 3) _____
- 4) _____
- 5) _____
- 6) _____
- 7) _____

Initials

- j. All participants agree not to propose any punitive action or proceeds in another form (such as the MSPB, additional EEO complaint, or administrative directive grievance procedure, or court) as long as this mediation continues.
- k. FMCS management agrees not to take or propose any formal action which could adversely affect any party to this mediation or completion of mediation, unless one or more of the participants conduct so seriously violates acceptable standards as to require immediate action. While all participants intend to continue with mediation until final conclusion, it is understood that mediation is voluntary and any participant may withdraw from mediation at any time. It is agreed that if one or more participant decide to withdraw from mediation, good faith efforts will be made to discuss this decision in the presence of both participants and the mediator.
- l. If the mediator determines that it is not possible to resolve the issue(s) through mediation, the process can be terminated once this has been conveyed to the participants and confirmed in writing.
- m. Should agreement be reached, the mediator will prepare a written agreement draft to be finalized in a joint session with the participants. Each participant will be advised to seek his/her own representative or legal counsel before the agreement is placed in final form and sent to the director of FMCS EEO Program for technical review. The agreement will be reviewed by all concerned for adequacy within 72 hours of its receipt. This is required to ensure the agreement meets with respective agency directives, policies and procedures.

I have read, understand and agree to my own free will and without coercion to each of the aforementioned provisions of this agreement.

Participant #1 _____ Date _____

Participant #1 _____ Date _____

Participant #1 _____ Date _____

Participant #1 _____ Date _____

Participant #1 _____ Date _____

Participant #1 _____ Date _____

Mediator _____ Date _____



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Appendix 3: Interest in the Alternative Dispute Resolution Process May 2019

U.S. Equal Employment Opportunity Commission (EEOC) regulations at 29 C.F.R. §1614.102(b)(2) require that the EEO counselor fully inform you, at the initial contact or as soon as possible thereafter, of the following:

- how the agency ADR program works and how to participate in the program where the agency agrees to offer ADR;
- if you choose to participate in an ADR program, the counseling period will be extended to ninety (90) days;
- you have the right to file a formal complaint if your complaint is not resolved through ADR.

Participation in an ADR program is voluntary on your part, as well as on management's part. ADR may be entered into at any time during the counseling process. If during counseling, participation in an ADR program is agreed upon by you and management, the counseling period may be extended up to, but not more than, 90 calendar days. Once ADR has been agreed upon through the counseling process, the election to ADR is final

If you have questions about the agency ADR program, you may contact _____.
If you have questions about EEO or EEO counseling under the regulations at 29 C.F.R. § 1614, you should ask Denise P. McKenney, EEO Director or another EEO counselor listed on the FMCS intranet.

By signing below, I certify that I have been informed of the applicability of 29 C.F.R. §1614.105(f) and have been provided a copy of this form. I understand that the original or a copy of this form will be made a part of the EEO director's/counselor's file as evidence of the counselor's compliance with 29 C.F.R. §1614.105(f). I understand that my signature on this form merely indicates my expression of interest in ADR and does not constitute an election to participate in ADR. I understand that if the agency offers to participate in mediation, I will be contacted by the EEO counselor and provided the opportunity to make an election to participate in ADR.

Name

Date

Date of initial contact _____

This is a confidential document.